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IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1981

No. 82-643

DANIEL P. O 'LEARY,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. GRADDICK
Attorney General
64 No. Union Street
Montgomery, AL 36130

J. ANTHONY McLAIN
Special Assistant Attorney General
McLain & Hampton
567 South Hull Street
Montgomery, AL 36104

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER THE BOARDING OF THE VESSELS IN QUESTION BY THE CUSTOMS OFFICERS WAS PROPER UNDER 19 U.S.C. §1581?

II.

WHETHER SECTION 19 U.S.C. §1581 IS CONSTITUTIONAL?

III.

WHETHER THE OPINION OF THE STATE COURT NOW IN QUESTION BY THE PETITIONER IGNORES THE MANDATES OF UNITED STATES V. SALVUCCI?

IV.

WHETHER A DEFENDANT IN A CRIMINAL PROSECUTION IS CONSTITUTIONALLY ENTITLED TO A JURY OR VENIRE WHICH IS A PERFECT MIRROR OF THE COMMUNITY?

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Contrary to the petitioner's statement in this regard, the opinions delivered in the courts below have been officially reported as follows:

O'Leary v. State, 417 So.2d 214, (Ct. Cr. App. May 6, 1980), reversed 417 So.2d 217 (Ala. S. Ct. January 9, 1981), on remand 417 So.2d 219 (Ct. Cr. App. June 23, 1981), affirmed 417 So. 2d 232 (Ala. S.Ct. May 21, 1981), rehearing denied 417 So.2d 241 (Ala. S.Ct. July 16, 1982).

These opinions are included in petitioner's appendix to his petition, with the exception of the decisions rendered May 6, 1980, and January 9, 1981.

ARGUMENT

I.

THE BOARDING OF THE VESSELS IN QUESTION BY THE CUSTOMS OFFICERS WAS PROPER UNDER 19 U.S.C. §1581.

The petitioner contends that the facts of this case failed to establish articulable facts upon which the boarding of the vessels in question could be made by customs officers under the above-cited statute. The facts of this case are fully set forth in the Alabama Supreme Court opinion issued in this case and found at pages 68-97 of petitioner's appendix to Petition for Writ of Certiorari. The respondent would submit that these facts sufficiently establish that the customs officers possessed sufficient information to justify boarding the vessels in question under the authority of 19 U.S.C. §1581.

The interpretation of this provision by the Fifth Circuit Court of Appeals is found

in the case of United States v. Serrano, 607 F. 2d 1145, 1148 (5th Cir. 1979):

> "...customs officers may make an investigation stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C. §1581 (a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband. See United States, v. Rivera, 595 F.2d 1095, 1098 n. 4 (5th Cir. 1979).

The facts as recitedby the Alabama Supreme Court show that there were sufficient facts justifying the boarding of the vessel by customs officers. The petitioner has cited no cases which in any way negate the justification of the facts of this case when viewed in light of 19 U.S.C. §1581 and the case law relative thereto. The respondent would argue that rather than there having been a limited application of this authorization of customs officers to board vessels, the standard set forth in Serrano, supra, has been reaffirmed

in the case of United States v. Ruano, 647 F. 2d 577, 579 (5th Cir. 1981). And the standard has found further extension by a holding that factors that support a customs search without suspicion in territorial waters would also permit customs searches within the contiguous zone when less cause than reasonable suspicion existed. United States v. Williams, 617 F. 2d 1063, 1088 n. 30 (5th Cir. 1980).

The facts in the case at bar support more than a generalized suspicion and speculation on behalf of the officers who boarded the vessels in question. The case law supports the findings of the Alabama Courts that the boarding by the officers pursuant to 19 U.S.C. §1581 was proper.

II.

SECTION 19 U.S.C. SECTION 1581 IS CONSTITUTIONAL.

The petitioner makes a general argument without the support of any case law, that 19 U.S.C. §1591 is unconstitutional. The argument of the petitioner is grounded in an assertion that the statute failed to impose geographical limits or restaints on the expansive language of the statute itself. The respondent would submit that the stautue itself satisfies the Fourth amendment requirement. The respondent would also urge adoption by the Court of the theory that the governments's interest in enforcing its laws be balanced against the individual's interests in his dignity and privacy and find that the provisions of this statute are constitutional. United States v. Williams, supra.

III.

THE OPINION OF THE STATE COURT NOW QUESTIONED BY THE PETITIONER DOES NOT IGNORE THE MANDATES OF UNITED STATES V. SALVUCCI, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).

The argument of the petitioner alleges that the State Court's switch from "no standing" to "error without injury" totally ignores the mandate of Salvucci, supra. The respondent would submit that a close reading of the Supreme Court of Alabama opinion found at pages 68-97 of the petitioner's appendix to Petition for Writ of Certiorari, takes into consideration the findings of this Honorable Court in the Salvucci, supra, case. Rather than ignoring the standard of Salvucci, supra, as wrongfully contended by the petitioner, the Alabama Supreme Court addressed the facts of this case in light of the Salvucci, supra, holding and found that the defendant was entitled to automatic standing but that the facts of the case did not support

any finding of injury to the petitioner's rights which would require reversal.

The respondent would therefore submit that the petitioner's argument that the Alabama Courts disregarded the Salvucci holding of this Court is without merit. In addition to this fact, the respondent would again rely upon the facts and cases set forth in part one of this argument to substantiate its proposition that the seach and seizure conducted in this case was proper. Again, petitioner has cited no case which would support a finding of unreasonableness with regard to the facts of the case at bar.

IV.

A DEFENDANT IN A CRIMINAL PROSECUTION IS NOT CONSTITUTIONALLY ENTITLED TO A JURY ROLE OR VENIRE WHICH IS A PERFECT MIRROR OF THE COMMUNITY.

The petitioner contends that the venire drawn at the trial of his case was improperly drawn and should therefore have been quashed. The jury selection system employed in Baldwin County, Alabama, was fully addressed by the Alabama Court of Criminal Appeals in the case of Oyarzun v. Pittman, 367 So. 2d 574 (Ala. Cr. App. 1978), cert den. 367 So.2d 584, (Ala. 1979). In that case the Alabama Court of Criminal Appeals found that the jury commission of Baldwin County had substantially complied with the provision of the new statute in Alabama dealing with jury composition.

The respondent would submit that the petitioner has cited no cases in support of his argument that this finding of the Alabama

court was improper. The facts substantiate the Alabama Court's finding that the authorities of Baldwin County had taken reasonable steps to insure compliance with Alabama law. The respondent would submit that neither the jury roll nor the venire need to be a perfect mirror of the community or accurately reflect the proportionate strenght of every identifiable group. Swain v. United States, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759. The respondent contends that the petitioner failed to carry that burden of proof necessary to establish that the venire from which he was required to select a jury for the trial was unconstitutionally drawn. As stated in Swain, supra, an imperfect system is not equivalent to purposeful discrimination. Petitioner has shown nothing which would be construed as an intentional systematic exclusion of any type of class of people from the jury roll of Baldwin County, Alabama. Nor has the petitioner shown any

cases or facts which would support his allegations that the courts of Alabama improperly denied his motion to quash the jury venire as it appeared in the trial of his case.

The respondent would contend that the holdings of the Alabama courts concerning the jury composition as found in Baldwin County, Alabama, at the time of the trial of this case are proper and comport with the constitutional safeguards as espoused by the opinions of this Honorable Court.

CONCLUSION

The respondent submits that the search and seizure conducted by the Customs Officers was proper under 19 U.S.C. §1581. The courts of Alabama properly applied cases decided by this Honorable Court in making a determination that the constitutional rights of the petitioner were not violated by the search and seizure. The respondent would argue that the provisions of 19 U.S.C. §1581 are constitutional and in no way violate the Fourth amendment rights of this petitioner, as 19 U.S.C. §1581 as been construed and limited by the doctrine of reasonableness as set forth in the case law of both the Fifth Circuit Court of Appeals and the United States Supreme Court.

The respondent would finally argue that the drawing and composition of the jury venire employed in the trial of this petitioner was proper under the laws of the State of Alabama

The petitioner has shown no fact of reversal nor any case which would support an argument that the jury commission had failed to comply with the laws of the State of Alabama thereby denying the petitioner his Constitutional right to a trial by jury.

For the foregoing reasons the respondent would request that the petitioner's Petition for a Writ of Certiorari to the Supreme Court of Alabama be denied.

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, respondent, do hereby certify that on this ___ day of November, 1982, I did serve a requisite number of copies of the foregoing on the attorney for the petitioner by mailing same to him, first class postage prepaid and addressed as follows:

W. Kenneth Gibson
P. O. Box 471
Fairhope, AL 35633

_____
J. Anthony McLain
Special Assistant Attorney General

Address of Counsel:

Office of the Attorney General
64 North Union Street
Montgomery, AL 36130